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REAL ESTATE
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IT'S NOT EASY BEING GREEN:

New York City Adopts New Requirements Concerning Energy and Water Use Benchmarking, Energy Audits, Energy Use Retro-Commissioning, Lighting System Retrofitting and Electricity Submetering for Covered Buildings

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In December 2009, the Mayor of New York City signed into law three pieces of legislation, dealing respectively with energy and water use benchmarking, energy audits/energy use retro-commissioning, and lighting system retrofitting/electricity submetering.[1] Each of these local laws applies generally to "covered buildings"—privately owned buildings, both residential and commercial, containing more than 50,000 square feet of area,[2] as well as "city buildings"—certain buildings owned or fully leased by the City of New York. The new local laws do not apply to single family to four-family homes.

Local Law 84 requires the owner[3] of each covered building in New York City to submit an annual benchmarking report regarding the building's total use of energy (electric, gas, fuel oil, and steam) and water during the previous calendar year. The first benchmarking report for each covered building, containing data for 2010, must be filed by May 1, 2011. The City will then disclose annually, on a website, data from the benchmarking reports. This will include, for each covered building, an energy utilization index, a comparison against other similar properties and a comparison across years. These listings will be available to the public by September 1, 2012 for covered buildings that are not primarily residential buildings and September 1, 2013 for covered buildings that are primarily residential. Potential tenants will be able to refer to this data when making leasing decisions. This will be particularly instructive for commercial tenants whose leases require them to pay rent at least in part based on building operating expenses.

Local Law 87 requires the owner of each covered building to do the following every 10 years:

- have an energy audit of the building, conforming to the "Level II" standards set by ASHRAE (American Society of Heating, Refrigeration and Air Conditioning Engineers), conducted by a properly credentialed third party;
- based on the audit's findings, cause the building systems that use energy and/or have an impact on energy consumption (including the building envelope and HVAC, conveying, domestic hot water, electrical and lighting systems) to be retro-commissioned to optimize energy efficiency (including repairs of defects, cleaning, adjustments of valves, sensors, controls, or programmed settings and/or changes in operational practices); and
- file a report regarding such energy audit and retro-commissioning work.

The first audit and retro-commissioning reports must be filed starting in 2013 with regard to all covered buildings on a tax block ending with the number three, and then in 2014 with regard to all covered buildings on a tax block ending with the number four, and so on until calendar year 2022 with regard to all covered buildings on a tax block ending with the number two. New audits and retro-commissioning must be performed, and new reports must be filed, every 10 years thereafter.

It is important to note that Local Law 87 contains certain provisions encouraging early compliance with the audit and

[1] An additional local law, Local Law 85, establishes a new Energy Conservation Code creating energy-efficiency requirements for owner-initiated or tenant-initiated alterations to existing buildings in New York City. This local law is not discussed in this Alert.

[2] "Covered buildings" also include multiple smaller buildings, containing an aggregate of more than 100,000 square feet of area, that either are located on the same tax lot or are cooperative or condominium buildings governed by the same board of directors or board of managers.

[3] For purposes of the new local laws, the term "owner" includes a lessee under a net lease for a term (including renewal options) of at least 49 years, the board of directors of a cooperative housing corporation and the board of managers of a condominium.

retro-commissioning requirements, as well as "grandfathering" certain buildings that have recently undergone high-level audits.

Local Law 88 requires the owner of each covered building to modify or replace the building's lighting systems (including interior lighting controls, light reduction controls, automatic lighting shutoffs, tandem wiring, exit signs, interior lighting power requirements and exterior lighting) to comply with the standards referred to in the new local law, no later than January 1, 2025. The new local law also requires that each tenant space containing more than 10,000 gross square feet, rented to a single tenant or subtenant, as well as each multitenanted floor containing more than 10,000 gross square feet, be separately submetered for electricity usage no later than January 1, 2025.

Given the lengths of time afforded to owners under Local Laws 87 and 88 for performing the requisite work, many building owners might be tempted to delay their efforts until the respective deadlines approach. However, there are a number of reasons to focus on these requirements, and perform the requisite work, much sooner:

- Funding programs (including cash grants and rebates, real property tax exemptions and abatements, business income tax breaks and energy discounts) are now available that will likely be phased out as the mandated deadlines approach.
- Early compliance with the new local laws can potentially result in material reductions in a building's energy use, resulting in significant near-term savings in operating costs for the building owner.
- Owners who perform the necessary work now (assuming, with respect to retro-commissioning, that their covered buildings qualify for early compliance) will be permitted to conform to the technical and environmental standards that are in effect when the work is done, rather than more stringent standards that will likely apply after the regulations contemplated by the new local laws are fully developed and put into effect.
- As more and more tenants, lenders, and purchasers focus on energy efficiency, and green building status in general, early compliance may also increase the value of the building and enhance tenant attraction and retention, particularly as the results of buildings' benchmarking start being publicly posted in 2012.

Owners of commercial covered buildings also should examine their existing space leases, and upgrade their forms for new leases, in contemplation of the audits and upgrade work to come, as well as with other green building issues. Landlords will require appropriate access to data concerning tenants' electricity and water use, and may wish to require access to leased premises to conduct audits and perform necessary work. Landlords need to consider the proper allocation of the costs of these projects for purposes of operating expense payments or escalation provisions, in addition to the manner in which tenants pay for their electricity use. A general provision requiring tenants to cooperate with the landlord in these or related green building efforts might also be considered.

If you are the owner or net tenant of a covered building, or are considering the acquisition of one, please contact us. Cozen O'Connor real estate, land use and environmental attorneys can help you plan your compliance efforts and fully guide you thorough the process, including assisting in obtaining the greatest available funding and/or financing for the work through programs that are now available, and offering referrals to knowledgeable construction and design professionals and consultants specializing in the process.

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